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PHOENIX, ARIZONA

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DEPARTMENT OF LAW LETTER OPINION NO. 72-16-L (R-42)

REQUESTED BY: THE HONORABLE WILLIAM M. SMITH
Yuma County Attorney

QUESTIONS:

1. If a defendant charged under A.R.S. § 36-1002.05 has a prior conviction for a narcotics offense, must that prior be alleged in the Information and proved in order to preclude the court from treating the offense as a misdemeanor?

2. If the prior conviction in Question 1 is alleged and proved, does this bring A.R.S. § 13-1649 into effect?

ANSWERS:

1. Yes.

2. No.

I

A.R.S. § 36-1002.05, like all the narcotics statutes with graduated penalties, provides that any "prior conviction . . . shall be alleged in the indictment or information. . . ." This is different from most statutes with enhanced or graduated penalties. The newly amended burglary statute, A.R.S. § 13-302.C, for instance, provides for increased punishment when accomplished with a gun, but it says nothing about how that knowledge is to be made known. It does not use the word "shall", and it says nothing as to when, if ever, the County Attorney is obliged to disclose that fact to the court.

A.R.S. § 13-1649 also provides for enhanced punishment, but it also does not oblige the County Attorney to "charge" priors. It simply provides what happens "if" he does. These statutes look as though they were drawn specifically to permit the County Attorney to do with priors (and other enhancement features) like a gun, as he sees fit. This is not so, however, with the narcotics statutes. Their wording is markedly different.

General law dictates that, before any statutory punishment may be enhanced because of a prior conviction, the conviction must be alleged and proved. If the prior is not

alleged and proved, a court may consider the prior but it may not invoke the statutorily enhanced (usually a minimum number of years) sentence. State v. Miles, 3 Ariz.App. 377, 414 P.2d 765 (1965).

A.R.S. § 36-1002.05 appears as though it was intended to go one step beyond the requirements of the general law, for it specifically directs the County Attorney to file the prior. It seems as though the Legislature intended to take from the prosecutor any discretion he might have in the filing of such priors. If it did, though, this would be the only area where it has ever done such a thing. And, if it did, there might well be a serious question as to whether it could constitutionally encroach that much upon the executive branch of government. It probably is not reasonable to assume that the Legislature had that in mind.

What is more reasonable is that the Legislature intended to urge the County Attorney to file priors, not order him to. In a very real sense, an "order" to file priors would, in a number of cases, be fruitless because the prosecutor does not always "know" of the priors.

All of which is to say that there is no statutory compulsion upon the prosecutor to file all narcotics priors. Thus, if one exists but is not filed, the court has no choice but to treat the offender as a first timer as far as sentence is concerned. But the narcotics statutes should not be treated as lightly as the other enhanced punishment statutes. They do set a policy--a policy that urges the prosecutor to file all priors that he is aware of.

II

The answer to Question 2 concerning A.R.S. § 13-1649 is much easier. Proving a prior under A.R.S. § 36-1002.05.B does not bring into effect A.R.S. § 13-1649. Since the two statutes both relate to enhanced punishment because of prior convictions, they are in pari materia, and must be construed together so as to give effect to each, if possible. Ard v. State, 102 Ariz. 221, 427 P.2d 913 (1967). Furthermore, statutes must be harmonized where there is a possibility of conflict. Ard v. State, supra.

And, generally, where a specific statutory provision deals with the same subject matter as a general statute, the more specific governs. Webb v. Dixon, 104 Ariz. 473, 455 P.2d 447 (1969); Trickel v. Rainbo Baking Company of Phoenix, 100 Ariz. 222, 412 P.2d 852 (1966). A general statute applies normally only to those matters not covered elsewhere specifically. State ex rel. Larson v. Farley, 106 Ariz. 119, 471 P.2d 731 (1970). Harmony and logic here dictate an obvious preference for adherence to the more specific and obviously tailored A.R.S. § 36-1002.05, paragraphs B and C.

As an aside, it should be noted that a prosecutor who wants to prohibit the court from treating the second or third offense as a misdemeanor, but also wants to prohibit the court from giving a minimum of two years, has only one alternative--neither allege nor prove the prior. Although he has the power to do this, it does appear to be in violation of the legislative intent in restructuring our lexicon of narcotics violations.

Respectfully submitted,

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